Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1999

MELKA MARINE, INC.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

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Question Presented for Review

Should the United States Government be permitted to deny a contractor delay costs when the government was solely responsible for the unreasonable delay and when the government agreed to pay the delay costs through the Suspension of Work clause in the contract?

Parties to the Proceeding

The caption of this case in this Supreme Court of the United States contains the names of all parties before the United States Court of Appeals for the Federal Circuit. Melka Marine, Inc. is not a parent, subsidiary or affiliate of any company.

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Opinion Below

The decision of the United States Court of Appeals for the Federal Circuit from which petitioner seeks certiorari appears in the Appendix hereto at page A-1. [*Melka Marine, Inc. v. U.S.*, 187 F.3d 1370 (1999).] The subsequent Order issued by the United States Court of Appeals for the Federal Circuit denying and declining, respectfully, petitioner's combined petition for rehearing and suggestion for

rehearing en banc appears in the Appendix hereto at page A-55. The Judgment Order of the trial court, the United States Court of Federal Claims, also appears in the Appendix hereto at page A-30. [*Melka Marine, Inc. v. U.S.*, 41 Fed. Cl. 122 (1998).] An earlier order entered by the trial court denying cross-motions for summary judgment also appears in the Appendix hereto at page A-50. [*Melka Marine, Inc. v. U.S.*, 38 Fed. Cl. 545 (1997).]

Jurisdiction

The decision of the United States Court of Appeals for the Federal Circuit was entered on August 12, 1999. A timely combined petition for rehearing and suggestion for rehearing en banc was filed on August 26, 1999; an Order denying and declining, respectfully, the combined petition for rehearing and suggestion for rehearing en banc was entered by the United States Court of Appeals for the Federal Circuit on October 7, 1999. This petition for writ of certiorari was filed within ninety days of said date of October 7, 1999. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

Statement of the Case

This petition for writ of certiorari arises from a construction contract entitled Repairs to Marina, Building 1689, Indian Head Division, Naval Surface Warfare Center, Indian Head, Maryland. The United States of America, acting by and through its Department of the Navy, awarded said contract on October 17, 1994 to Melka Marine, Inc. (hereinafter sometimes referred to as "Melka Marine"). Included in the contract work was dredging in the Potomac River, the construction of a breakwater, repairs to an existing boat ramp, and various other work. The original contract amount was $305,272.00.

Melka Marine was delayed 419 additional days on the contract work that was scheduled to be completed in 81 days. The contract took 500 days to complete. The government caused the delay by failing to timely obtain a dredging permit. Both the dredging and the breakwater work could not be started without the dredging permit. The contract allowed only 90 days to complete the actual work (including mobilization and demobilization) and an additional 15 days for insurance and bonds for a total contract time of

105 days. The contract required Melka Marine to commence work within said 15 days after contract award and stated the original completion date as January 30, 1995. Melka Marine began mobilization on November 1, 1994 and completed mobilization on November 15, 1994. Melka Marine was liable for liquidated damages in the amount of $200.00 per day plus any fines that may have been leveled if the work was not completed within the time allowed under the contract.

Melka Marine originally scheduled the work, including mobilization, to commence on November 1, 1994 and scheduled completion, including demobilization, by January 6, 1995 or within 81 calendar days of contract award. Melka Marine's schedule was submitted for approval on October 27, 1994 and the same dates were resubmitted in a revised format on November 12, 1994; the revised format was approved by the government on November 22, 1994. Melka Marine had carefully scheduled the work, including the dredging and breakwater work, to be completed within the time stated in the approved scheduled.

Furthermore, the approved schedule of prices, breaks down the contract price as follows:

1. Mobilization	$37,500
2. Breakwater	100,606
3. Dredge & Disposal	116,552
4. Repair Quaywall	24,346
5. Repair Boat Ramp	13,362
6. Drive Pile	1,774
7. Repair Finger Pier	1,133
8. Demobilization	10,000
Total	$305,272

After Melka Marine completed the "Mobilization" which was $37,500 or 12 percent (37,500/305,272) of the original contract amount, the remaining "Breakwater, Dredge & Disposal" items are priced at 100,606 and 116,552, respectively, or 71 percent (217,158/305,272) of the original contract amount. The work that Melka Marine was able to perform without a dredging permit consisted of "Repair Quaywall, Repair Boat Ramp, Drive Pile and Repair Finger Pier" work items which are priced at 24,346; 13,362; 1,774; and 1,133 respectively, or 13 percent (40,615/305,272) of the original contract amount. That is, after Melka Marine had completed the "Mobilization", without a dredging permit, Melka Marine was only able to proceed

with 13 percent of the original contract work. The lack of the dredging permit caused Melka Marine to be delayed in the performance of 71 percent of the original contract work ("Breakwater, Dredge & Disposal" items). Hence, it is clear that Melka Marine was delayed from performing a major part of the contract.

On November 29, 1994, the government by and through the Contracting Officer issued a formal "Suspension of Work" Order that suspended the dredging and breakwater work "for an indefinite period" and stated:

> "Pursuant to the Federal Acquisition Regulation (FAR), Contract Clause 'Suspension of Work' (APR 84), this correspondence shall serve as a 'Suspension of Work' for an indefinite period. YOU ARE HEREBY DIRECTED to stop all performance immediately on all work called for by the subject contract.
>
> "Upon receipt of this letter you shall immediately comply with its terms and take all reasonable steps necessary to minimize the incurrence of costs to work covered by suspension during the period of work stoppage." (Emphasis in original text.)

Following the above direction, Melka Marine received further direction in a letter dated December 1, 1994 that stated:

> "The following information shall revise our fax dated 29 November 1994 which directed you to stop work. The Corps of Engineer permit for this project is not expected to be approved until mid-January or mid-February. Therefore, all work relating to the dredging and breakwater repairs cannot begin until the permit is received.
>
> "Work may commence on the repairs to the quaywall and to the finger pier. The A/E is investigating the boat ramp questions brought up in your letter dated 23 November 1994. Once clarification on those questions is received, work may continue on the boat ramp. All equipment on site that will not be utilized on the repairs to the boat ramp, quaywall, or the finger pier can be demobilized. Take any other steps necessary to minimize the incurrence of costs due to the suspension of permit related work."

On March 31, 1995 after several letters, numerous discussions and revised drafts, the parties executed a contract modification entitled POOOO1 related to the "Suspension of Work"

Order. There was disagreement as to the proposed language of POOOO1 between the parties; Melka Marine was straight forward in advising the government that Melka Marine did not want to waive its claims for additional delay costs. The government stated in writing the following on March 31, 1995:

> "Included is the best that I can do to revise the language on the modification. I reiterate that this modification has to be signed today because of funds expiration. Please let me know ASAP if you are willing to come in and sign the modification today, so I know whether to proceed with a termination for convenience or not."

Even though the government stated to Melka Marine that Melka Marine had to sign POOOO1 or have the contract terminated for convenience, the government still intended to terminate the contract for convenience if the government did not see progress with the permit. In an internal government memorandum drafted March 20, 1995, the government states:

> "1. Contractor has been under a stop work order since 1 December 1994 on the dredging and breakwater

> portions of the project. The required COE permits for dredging were never obtained by the government as required. To this date, the permits still have not been received.
>
> . . .
>
> "4. In a phone conversation with Steve Orsino (EFA Ches Legal) on 17 March 1995, he indicated to go ahead with a modification to delay the work until 15 October 1995. If we did not see any progress with the permit, we could T4C before that date.
> ". . . [E.S. McGinley, III] 3/20/95"

On March 31, 1995, the government issued POOOO1 (which the government choose to date March 30, 1995 purportedly because of funding) stating in part that:

> "1. Dredging and breakwater extension work cannot begin until 15 October 1995. The only costs associated with this delay are remobilization/demobilization costs equal to those on the schedule of prices, less the bond cost. No impact and/or delay costs associated with the delay in the remaining portion of the work from the date that Melka Marine, Inc. signs this modification until 15 October 1995 will be recognized.
> (P/C #1) ADD $42,688.00

> "The contract time is hereby EXTENDED by 395 calendar days from 30 January 1995 to and including 29 February 1996."

On April 4, 1995, Melka Marine advised the government by letter as follows:

> "This letter is to confirm Melka Marine, Inc.'s (MMI) understanding regarding the signing of POOOO1. It was understood by all that MMI reserves its rights and intends to file claims from commence of the contract through March 30, 1995 and MMI did not relinquish any rights to file claims after October 15, 1995. As I explained to Ms. Cooper and Lt. McGinley, MMI will be filing any claims after the cost are ascertained.
>
> "If there is any disagreement with the contents of this letter, then your immediate response will be appreciated."

Melka Marine did not receive any objections to the above letter dated April 4, 1995. Said contract states that the "Suspension of Work" clause (April 1984) is part of the contract between the parties. The "Suspension of Work" clause states in part that: "an adjustment shall be made for any increase in the cost of performance of this

contract". This petition addresses the denial of Melka Marine's claims for unabsorbed overhead costs, equipment delay costs and unproductive labor costs.

The trial court ruled that Melka Marine was not entitled to any recovery for any of the costs claimed for the delay. The Federal Circuit reversed the holding of the trial court with respect to the denial of unabsorbed costs during the time period of January 4, 1995 to February 2, 1995 and remanded the case to the trial court. The Federal Circuit affirmed the denial of all other costs including equipment delay costs, unproductive labor costs and unabsorbed overhead costs for the time period from November 16, 1994 to January 3, 1995 and from February 3, 1995 to March 30, 1995.

The United States Court of Appeals for the Federal Circuit had jurisdiction pursuant to Title 28, United States Code, Section 1295(a)(3)(1994). The United States Court of Federal Claims had jurisdiction pursuant to Title 28, United States Code, Section 1491 and Title 41, United States Code, Section 601 et seq.

Argument

The government has created a maze-like confusion to prevent the recovery of delay costs of a contractor. The government issued a formal "Suspension of Work" Order suspending Melka Marine's work as a result of the government's failure to timely obtain the dredging permit. Under the language of the "Suspension of Work" clause, it is clear that the government is liable for Melka Marine's costs incurred as a result of the "Suspension of Work". The government should not be allowed to take away with its left hand what the government represents it is giving with its right hand, i.e., the promise to pay for delay costs through the "Suspension of Work" clause.

As this Supreme Court of the United States is well aware, the "Suspension of Work" clause is a creature of the contract between the parties that provides for the government to compensate a contractor for a delay that otherwise would be a breach of the contract. In *United States v. Utah Const. & Min. Co.*, 384 U.S. 394, 86 S.Ct. 1545 (1966), this Supreme Court of the United States

addressed the "Suspension of Work" clause and stated:

> "An illustration of the disestablishment of breach of contract claims through the fashioning of additional contract adjustment provisions is provided by contractual provisions designed to deal with just such claims for delay damages as are presented here. In response to the importunings of Army contractors following this Court's ruling in United States v. Rice, 317 U.S. 61, 63 S.Ct. 120, 87 L.Ed. 53, that the contractor's remedy under Article 9 was limited to an extension of time, a 'Suspension of Work' clause was adopted for use in construction contracts, see T. C. Bateson Constr. Co., 1960-1 B.C.A. 2552 (ASBCA 1960), at 12,347-12,348 and has been the basis for administrative allowance of delay damages in numerous cases." *Id.*, 384 U.S. 415-416, 86 S.Ct. 1556-1557.

Prior to the "Suspension of Work" clause, as noted in the above-quoted language, this matter would have been approached as a breach of contract claim entitling Melka Marine to common law damages. In the early eighteen hundreds in *Gelston v. Hoyt*, 16 U.S. 246, 325 (1818), this Supreme Court of the United States explained:

> "There is no law of the United States, which interferes with, or touches, the question of damages. It is a question depending altogether upon the common law . . ."

Accordingly, the government's recently imposed requirements to recover under the "Suspension of Work" clause should not be imposed beyond the requirements of the common law. Now that the government has disestablished a contractor's breach of contract cause of action that could have been made but for the "Suspension of Work" clause, Melka Marine is being denied the recovery of costs clearly established by the "Suspension of Work" clause.

Previously, this Supreme Court of the United States has not required that damages be proven with "mathematical certainty". In *C.B.C. Enterprises, Inc. v. U.S.*, 978 F.2d 669, 674 (Fed. Cir. 1992), the Federal Circuit stated:

> "'When the evidence adequately proves the existence of damages owing to a delay in work on the project, the extent of those damages need not be quantified to a mathematical certainty,' citing Story Parchment Co. v. Paterson

Parchment Paper Co., 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed.2d 544 (1931)."

Thus, Melka Marine's proof of damages or costs are not required to be proven through overly complex technical rules and formulas.

Nevertheless, while the government fully expected Melka Marine to follow its contractual direction to stop the breakwater and dredging work, the government has denied that Melka Marine is entitled to be paid for the majority of costs incurred by said direction. Under the terms of the "Suspension of Work" clause of the contract, Melka Marine is supposedly clearly entitled to be paid for the time the government had Melka Marine in the position where Melka Marine was required to be ready and able to perform the work. During this time, the government did not allow Melka Marine to proceed with said work through no fault of Melka Marine. The government cannot have it both ways. The government cannot and should not be allowed to hold Melka Marine on a "hook" and then take the position that Melka Marine is not entitled to recover its associated costs. The delay was clearly an unreasonable delay. The cause of

the delay, the failure of the government to timely obtain the dredging permit, was solely caused by the government's inactions. The delay resulted in injury to Melka Marine.

By way of background, the history of the *Eichleay* formula dates back to the early 1960's from a decision by the Armed Services Board of Contract Appeals. In *Eichleay Corporation*, ASBCA No. 5183, 61-1 BCA ¶ 2894, Page 73254, 1960 WL 684, the Board's holding on reconsideration of its decision was that:

> "The suspensions occurred at various times and in connection with various features of the contract work. Performance of the contracts was at no time completely suspended and the delays were not continuous. One item of work would be suspended, then another and so on through an extended series of suspensions. The partial suspensions were lifted at innumerable, varying intervals over a prolonged period of time with the issuance of the numerous modifications providing for changes in the contracts. Under these circumstances it would not have been prudent or practical for appellant either to risk the layoff of Home Office personnel or facilities, or, on the other hand, to absorb personnel and

> facilities so made idle by taking on new commitments. The mere showing of these facts is sufficient to transfer to the Government the burden of going forward with proof that appellant suffered no loss or should have suffered no loss."

Prior to the *Eichleay* formula, the courts recognized the recovery of unabsorbed overhead in cases such as *Fred R. Comb Co. v. U.S.*, 103 Ct.Cl. 174 (1945).

More recently, in *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574 (Fed. Cir. 1994) the Federal Circuit limited the recovery of unabsorbed overhead to the calculation known as the *Eichleay* formula. It must be kept in mind that the "Suspension of Work" clause in the contract clearly does not limit how damages may be computed. The government is further limiting the recovery of damages by taking the position that even though Melka Marine was clearly delayed in the dredging and breakwater work solely as a result of the government failing to obtain a dredging permit, the government is not responsible for the costs caused directly as a result of the delay except for the unabsorbed

overhead for time period from January 4, 1995 to February 2, 1995.

Accordingly, even though Melka Marine was contractually required to commence work under the contract by November 1, 1994 or face default, even though the government approved Melka Marine's schedule to complete the work by January 6, 1995, even though the dredging and breakwater work represented 71 percent of the contract, and even though the government and Melka Marine agreed through POOOO1 that Melka Marine could claim the delay costs up until March 30, 1995, Melka Marine has been denied recovery. This is a classic case of "just refusing to pay the bill" even though the government awarded a contract without the required dredging permit and even though the government was clearly liable for the delay. This case creates another disincentive to contract with the government.

The Federal Circuit correctly ruled in this case that the government may be responsible for Melka Marine's costs calculated as *Eichleay* damages from January 4, 1995 to February 2, 1995 (which is at least part of the delay caused by the government). However, by cannily dividing

the overall period of delay into separate mini-time segments, the government and the lower courts have effectively denied Melka Marine recovery of the balance of its delay costs for a delay for which the government is clearly liable. It defies common sense and justice that the government is only required to pay for a part of the overall delay.

Just as the Federal Circuit stated the recovering of *Eichleay* damages is not an all or nothing recovery (i.e., there can be a partial recovery of unabsorbed overhead), there is also a basis for the partial recovery of *Eichleay* damages dependent upon the amount of contract work that was suspended versus the amount of contract work that was able to be performed. In the instant case, Melka Marine was unable to perform the dredging and breakwater work (71 percent) from November 16, 1994 through October 15, 1995. During the first of said mini-time segments from November 16, to November 29, 1994, Melka Marine was delayed even though the "Suspension of Work" Order had not yet been issued.

Furthermore, the legal reasoning of denying Melka Marine recovery of *Eichleay* damages during the second of said mini-time segments

from November 29, 1994 to January 4, 1995 does not comport with the Federal Circuit's prior rulings. See A-12 of the decision wherein the Federal Circuit ruled:

> ". . . If work on the contract continues uninterrupted, albeit in a different order than originally planned, the contractor is not on standby . . . ."

Prior to the above-quoted ruling, a contractor was not required to "sit idle twiddling its thumbs" in order to recover costs for delay. In *Interstate General Government Contractors v. West*, 12 F.3d 1053, 1057, 1058 (Fed. Cir. 1996), the Federal Circuit stated the test for being on "standby" focuses not on idleness but on the "Suspension of Work":

> "Properly understood, the 'standby' test focuses not on the idleness of the contractor's work force (either assigned to the contract or total work force), but on suspension of work on the contract . . .
>
> ". . . The proper standby test focuses on the delay or suspension of contract performance for an uncertain duration, during which a contractor is required to remain ready to perform. . . ."

In Melka Marine's case, the Federal Circuit contradicted the above-quoted language from *Interstate* and said under a "Suspension of Work" directive, a contractor is not on standby if the contractor has any other work to perform. This position ignores whether or not the work delayed is on the critical path or is work that does not completely absorb the overhead that was to be absorbed by the work that was delayed. Moreover, the change by the Federal Circuit in the definition of the term "standby" effectively denies Melka Marine recovery of its unabsorbed overhead and is contrary to the "Suspension of Work" clause in the contract. In addition, the Federal Circuit emphasized in footnote number 4 in the above-quoted text that a requirement for a contractor to be actually idle would penalize a contractor for mitigating damages. The court in *Interstate* stated in footnote number 4 that:

> "Although idleness of workers is evidence that a contractor is on standby, i.e., performance has been suspended, it is neither conclusive nor required. Sound public policy requires this distinction. If the test were whether the contractor's work force assigned to the contract in issue

> was standing by, the contractor would be penalized for, and thus deterred from, mitigating its damages for direct costs by reassigning its employees to other jobs or laying them off during the period of delay. Moreover, suspension rarely need be proven by such indirect evidence because it is usually effected, as here, by a written communication from the CO."

Clearly, while Melka Marine was delayed during the time period from November 29, 1994 to January 4, 1995, Melka Marine was under a written communication from the Contracting Officer who placed the dredging and breakwater work in suspension for an indefinite period of time. Thus, according to the above-quoted language of *Interstate*, Melka Marine was on "standby". The decision in the instant case of Melka Marine conflicts with *Interstate*. The Melka Marine decision adds more confusion as to when the contractor is entitled to *Eichleay* damages. Even the Federal Circuit has quoted language from a commentator about what the Federal Circuit intended in its decision in *Satellite Electric Co. v. Dalton*, 105 F.3d 1418 (Fed. Cir. 1997) stating:

> ". . . Two commentators have remarked that if this statement is interpreted literally, Satellite Electric can be read to mean that . . . the contractor will not be entitled to Eichleay damages. Both from a legal and an accounting perspective, it seems unlikely that the court [Federal Circuit] intended such a construction." *Melka Marine*, 187 F.3d at 1377.

Melka Marine respectfully request that this Supreme Court of the United States visit this matter. The same logic and legal reasoning that resulted in the Federal Circuit recognizing that a contractor who only obtains replacement work that absorbs only $500.00 per day in overhead costs may be entitled to recover the remaining unabsorbed costs applies herein. See A-27. The Federal Circuit stated on A-27 of its decision that:

> "In another example, assume that the government shows that it was not impractical for the contractor to obtain one thirty-day replacement contract that contributed $500 per day to overhead costs. Then Eichleay damages would not be precluded because roughly half of the overhead costs would remain unabsorbed."

In order to deny Melka Marine damages

during the day of January 3, 1995, the Federal Circuit found that "substantial work" (in the sum of only 13 percent) was performed during the period from November 29, 1994 to January 4, 1995 (as opposed to *Altmayer, infra*, wherein the performance of minor work during the delay did not defeat a claim for recovery for delay damages). Presently, the right of recovery of damages is predicated upon whether the court finds the amount of work that could be performed is a minor amount of work (*Altmayer*) or a substantial amount of work (*Melka Marine*). In *Altmayer v. Johnson*, 79 F.3d 1129, 1132, 1133 (Fed. Cir. 1996), Chief Judge Mayer of the Federal Circuit stated the disruption in the work reduces the overhead that is absorbed thereby entitling the contractor to recover the unabsorbed overhead:

> "When the government delays or disrupts contract performance, ultimately requiring that it be extended, the contractor's stream of income from the government for the direct costs it has incurred under the contract is reduced or interrupted. See generally Wickham, 12 F.3d at 1577. However, home office overhead continues to accrue throughout both the original and extended

> performance periods, regardless of direct contract activity.
>
> . . .
>
> "When the government disrupts or delays a contract, thereby reducing the contractor's stream of direct costs against which to charge its overhead costs, 'it is appropriate to use the Eichleay formula to calculate extended home office overhead . . ."

The language from *Altmayer* is in direct contradiction with the decision of Melka Marine. The Federal Circuit held in Melka Marine that because Melka Marine was not standing by idle from November 29, 1994 to January 4, 1995, Melka Marine was not entitled to Eichleay damages. In *Altmayer*, the Federal Circuit stated:

> "Nor is recovery under Eichleay compromised because Haas continued to perform minor tasks throughout the period of government indecision. The standby test does not require that the contractor's work force be idle. Interstate, 12 F.3d at 1057. There is no requirement that a contract be suspended before a contractor is entitled to recover under Eichleay. Indeed, in Eichleay itself, '[p]erformance of the contracts was at no time completely suspended.' Eichleay Corp., 61-1 B.C.A. (CCH) at

15,117; see also Capital Elec., 729 F.2d at 743; C.B.C. Enters., 978 F.2d at 674. As the D.C. Circuit said in rejecting an argument that the Eichleay formula is only applicable to contract suspensions, as opposed to contract extensions:

> It may be true that when a project is extended (not suspended), the work will be ongoing and thus income from the project will continue to be applied to home office overhead costs. On the other hand, when work is extended, the project income will be spread over a longer period of time and, consequently, less of the income may be allocated to home office overhead costs. Thus, an extended project -- like a suspended project -- may result in reduced income vis-a-vis overhead costs.

"Williams Enters. v. Sherman R. Smoot Co., 938 F.2d 230, 235 (D.C. Cir. 1991). This is precisely our situation." *Id.*, 79 F.3d at 1134.

Hence, as stated above by the Federal Circuit quoting the District of Columbia Circuit, the case

law prior to Melka Marine was clearly that the contractor need not be sitting idle to collect *Eichleay* damages. In *Melka Marine*, the Federal Circuit held the fact that Melka Marine had some work (13%) to perform eliminated the recovery of *Eichleay* damages from November 29, 1994 through January 4, 1995. Again, in *Altmayer*, the Federal Circuit stated:

> "Haas continued to do some work during the period of government indecision, but it was on minor items 'susceptible to prompt completion.' (Citation omitted.) Haas did not need to complete these minor tasks before the originally-scheduled contract completion date because the renovation could not be completed until several weeks after the carpet had been delivered. Notwithstanding Haas's continuous work on minor contract items, the fact remains that the overall project income was spread over an additional three-month period; hence, less of that income was allocable to home office overhead costs. Therefore, Haas's work on minor contract items does not deprive it of recovery under the Eichleay formula." *Id.*, 79 F.3d at 1134.

The decision in Melka Marine's case is in conflict with the above-quoted language in that

Melka Marine was denied recovery even though Melka Marine's contract period was extended from 81 days to 500 days. Again, in the above-quoted language, the Federal Circuit stated that when a contractor's performance period is disrupted or delayed, the contractor is entitled to recover its unabsorbed overhead. Furthermore, the District of Columbia Circuit holding in *Williams, supra*, provided for the recovery of unabsorbed overhead under the facts in the instant case of Melka Marine.

With all due respect to the Federal Circuit, the Federal Circuit's present ruling is contrary to the prior rulings above and would create another exception to *Eichleay* damages by distinguishing between "minor work" and "significant work" being performed during the suspension of work. The issue is not whether "minor or significant work" was being performed. The issue is whether work that was to absorb overhead during the scheduled contract period was suspended and/or extended thereby causing Melka Marine to incur unabsorbed overhead costs. Simply stated, the contract overhead for the period from November 29, 1994 to January 4, 1995 was not absorbed by

the 13 percent of contract work (as opposed to the 84 percent that was scheduled) performed during this period. Any costs recovered through any contract modifications have not been claimed.

During the last of said mini-time segments from February 2, 1995 to March 30, 1995, the lower courts have ruled that Melka Marine was not entitled to its costs even though the parties had agreed that Melka Marine would claim for the time period up to March 30, 1995.

It must not be forgotten that it was the government who issued the "Suspension of Work" Order "for an indefinite period" as a result of the government's failure to timely obtain the dredging permit. How is a contractor to bid or more aptly gamble on how the government is going to interpret its "Suspension of Work" clause. Moreover, the Federal Circuit failed to explain the reason why it denied Melka Marine its direct costs for equipment and labor. The Federal Circuit stated that some indirect costs (unabsorbed overhead) may be recoverable from January 4, 1995 to February 2, 1995 while denying said direct costs for the same time period. Again, it is not logical that Melka Marine may be entitled to

its indirect costs and not its direct costs for the same period.

This case is one of those cases that is nothing less than an outrageous example of injustice created as a result of a maze of interpretations that gives the government room to side-step the clear liability of the government under the "Suspension of Work" clause.

Melka Marine respectfully requests that this Supreme Court review the above matter for the purpose of confirming that the right of recovery of delay costs or damages need not be so complicated.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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APPENDIX

United States Court of Appeals for the Federal Circuit

98-5149

MELKA MARINE, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Peter Paul Mitrano, of Etna, New Hampshire, argued for plaintiff-appellant.

Franklin E. White Jr., Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With him on he brief were David M. Cohen, Director, and Sharon Y. Eubanks, Deputy Director.

Appealed from: United States Court of Federal Claims, Judge Robert H. Hodges, Jr.

DECIDED: August 12, 1999

[187 F.3d 1370]

Before MAYER, Chief Judge, MICHEL, and RADER, Circuit Judges.

MICHEL, Circuit Judge.

Melka Marine, Inc. ("Melka") appeals from the decision of the United States Court of Federal Claims, dismissing Melka's complaint which sought damages in connection with a waterfront construction contract awarded by the United States Department of the Navy. *See Melka Marine, Inc. v. United States*, 41 Fed. Cl. 122 (1998). After denying a motion and cross-motion for summary judgment, the Court of Federal Claims conducted a one-day trial on November 24, 1997. On June 10, 1998, the Court issued an opinion and order denying Melka's claims in their entirety and dismissing Melka's complaint. Melka appeals, contending that it has proven it is entitled to damages stemming from government-caused delay between November 16, 1994 and March 30, 1995. Because the Court applied an incorrect test and Melka has shown that it may be entitled to recover at least some damages for a portion of the time period (if the correct test is used), we affirm-in-part, vacate-in-part, and

remand for further proceedings in accordance with this opinion.

BACKGROUND

On October 17, 1994, the United States (the "government"), through the Department of the Navy, awarded Melka a contract that included dredging work in the Potomac River near Washington, DC, as well as the construction of a breakwater, repairs to an existing boat ramp, a quaywall, and a finger pier, and various other repair work. The contract required the government to obtain a dredging permit from the United States Army Corps of Engineers prior to the commencement of the dredging and breakwater work, but not for the repair work.

On November 4, 1994, the government notified Melka that the permit had not yet been obtained, but was expected at any time. In the meantime, the government noted that no "dredge work can start until this permit is approved, however, construction repairs are not dependent on this permit." Melka mobilized all of its equipment to the job site by November 15, 1994.

On November 16, 1994, Melka sent a letter to the government stating that Melka's proposed

schedule for completing the work, previously submitted, would be negatively impacted by the government's failure timely to obtain a permit and that, as requested, it would re-sequence the work to avoid inactivity. The government did not respond to this letter. On November 21, Melka began the re-sequenced work by starting work on the boat ramp. Work was suspended the next day, however, due to the discovery of a six-inch pipe in the ramp and the discovery of a prior boat ramp beneath the existing ramp, which would necessitate a different ramp design.

As a result of these delays and the delay in obtaining a permit, on November 29 the government issued a formal "Suspension of Work" order. The order suspended the commencement of dredging and breakwater work "for an indefinite period." Two days later on December 1, the government revised its "Suspension of Work" order. The letter stated in part:

> The Corps of Engineers permit for this project is not expected to be approved until mid-January or mid-February. Therefore, all work relating to the dredging and breakwater repairs cannot begin until the permit is received.

> Work may commence on the repairs to the quaywall and to the finger pier. . . . All equipment on site that will not be utilized on the repairs to the boat ramp, quaywall, or finger pier can be demobilized. Take any other steps necessary to minimize the incurrence of costs due to the suspension of permit related work.

By December 27, 1994, Melka had demobilized its dredging and breakwater equipment while it continued the re-sequenced repair work, which was substantially completed by January 4, 1995.

Melka later mobilized its dredging and breakwater equipment elsewhere for use on other jobs. The two most significant jobs that Melka undertook during this period were the Steuart Petroleum project from January 4-18, 1995, and the Leesylvania Park project from January 20, 1995 through March 31, 1995. Melka originally scheduled these jobs to be performed after the government project, but the government-imposed delay allowed Melka to perform these jobs earlier.

Melka also bid on other projects during this period which it did not receive, but that it would

have been able to perform at some point had they been awarded the projects. Indeed, Leonard Melka testified that Melka bid upon "every project [that it] could find to bid on." Counsel for Melka also indicated at trial that Melka did not turn down any work that had been offered to it during the January time frame.

On February 2, 1995, the parties met to discuss the continuing delay in obtaining the permit. At the meeting, the government informed Melka that work on the dredging and breakwater, rather than commencing in February 1995, could not begin until October 15, 1995, and requested that it agree to perform this work under the original contract price. By letter dated February 14, 1995, Melka agreed and proposed a completion date of February 29, 1996.[1] All work

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1 Three contract modifications were also entered into. Modification P00001, proposed by the government on March 30, 1995, was a bi-lateral modification that extended the time for performance through February 29, 1996 and compensated Melka for remobilization/demobilization costs associated with the postponement of the work until October 15, 1995. Modification P00002 was a bi-lateral modification that compensated Melka for costs

was completed by February 1996.

On appeal, as below, Melka asserts that it is entitled to recovery of its unabsorbed overhead from November 16, 1994 through March 30, 1995.[2] We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (1994).

DISCUSSION

I.

We review legal conclusions of the Court of Federal Claims *de novo*, while its factual findings at trial are reviewed for clear error. *See Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998).

Melka alleges that it is entitled to reimbursement of its unabsorbed home office

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arising from the changed condition of the quaywall and for the delay caused by the discovery of the pipe in November 1994. Modification P00003 was a unilateral modification compensating Melka for overhead and field costs arising from the costs associated with performing the work out of sequence and for its dredging and breakwater equipment for twelve days.

2 Melka also alleges that it is entitled to direct costs for the idle equipment and labor expenses, but we find Melka's arguments on these issues without merit, and not warranting specific discussion.

overhead costs caused by the government's delay as calculated by the formula articulated in *Eichleay Corp.*, ASABCA No. 5183, 60-2 B.C.A. (CCH) 2688, 1960 WL 538 (1960).[3] The *Eichleay* formula is the only means approved in our case law for calculating recovery for unabsorbed home office overhead. See E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369, 1372 (Fed. Cir. 1999). Home office overhead typically includes accounting and payroll services, salaries for upper-level managers, general insurance, utilities, taxes, and depreciation. *See Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1058 (Fed. Cir. 1993).

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3 Determining the amount of recoverable damages under the "*Eichleay* formula" requires three steps: (1) find the allocable contract overhead by multiplying the total overhead cost incurred during the contract period by the ratio of billings from the delayed contract to total billings of the contractor during the contract period; (2) find the daily contract overhead rate by dividing the allocable contract overhead by the number of days of contract performance; and (3) determine the amount recoverable by multiplying the number of days of delay by the daily contract overhead rate. See Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1577 n.3 (Fed. Cir. 1994).

Melka must satisfy two requirements in order to show that it is entitled to *Eichleay* damages: (1) the government required the contractor to stand by during government-caused delay of indefinite duration; and (2) while and because of standing by, the contractor was unable to take on other work. *Interstate*, 12 F.3d at 1056. If the contractor can make out a *prima facie* case of (1) above, i.e., that the government-imposed delay was uncertain and that the government required the contractor to remain on standby, ready to resume full work immediately, the burden shifts to the government to show either (1) that it was not impractical for the contractor to obtain "replacement work" during the delay, or (2) that the contractor's inability to obtain such work, or to perform it, was not caused by the government's suspension. *See West v. All-State Boiler, Inc.*, 146 F.3d 1368, 1376 (Fed. Cir. 1998).

A.

For the time periods from November 16, 1994 to January 4, 1995 and February 2, 1995 to March 30, 1995, the Court of Federal Claims correctly applied the law and did not clearly err in

its factual findings when it concluded that Melka was not entitled to *Eichleay* damages because, it found, Melka was not on indefinite duration standby during those time periods. By failing to meet the "standby" requirement, Melka's claims for *Eichleay* damages during these periods must fail, even in the absence of government rebuttal evidence because Melka failed to establish a *prima facie* case of entitlement to *Eichleay* damages.

With respect to the earliest time frame, from November 16 (the beginning of Melka's alleged damages period) to November 29, 1994 (the date the government issued the formal Suspension of Work order), the Court of Federal Claims found that no government-imposed delay in fact occurred; therefore Melka could not have been on "standby" during this period. Although the government had failed to obtain a permit for the dredging and breakwater work, the parties had agreed that Melka would re-sequence its work so that non-permit related work could be done during this period, and Melka did so. The Court of Federal Claims did not clearly err in finding that Melka was not on standby when it

was working on the contract and the government had not suspended all contract work.

With respect to the second time period, from November 29, 1994 to January 4, 1995 (the approximate end of Melka's performance of all those contract tasks not dependent upon issuance of the permit), the Court of Federal Claims found that Melka was still not on standby. Although the government issued a suspension of work order at the beginning of this period, that order directed Melka to perform non permit-related work and indicated that the dredging permit would not be obtained until January or February, 1995. After the suspension of work order, Melka continued to work on the contract (with re-sequenced work) and did so on a virtually uninterrupted basis through January 3, 1995. Melka argues that because the dredging and breakwater work accounted for a significant amount of the work in the government contract, that once such work was suspended indefinitely Melka was on standby. Melka's argument would be more convincing if the entire government contract related to dredging and breakwater work, so that the suspension of work order effectively

stopped any work on the contract. However, this was not the case. Other significant repair work required under the contract was performed through January 3, and the suspension of work order directed Melka to perform such work. Melka cannot establish that it was on standby by dividing the contract into one portion that was able to be performed (the repairs) and another that was on standby (the dredging and breakwater work), because the contract required that both types of work be performed. If work on the contract continues uninterrupted, albeit in a different order than originally planned, the contractor is not on standby. Given these facts, the Court of Federal Claims did not clearly err in finding that Melka was not on standby during this period.

During the latest time period, from February 2, 1995 (when the government informed Melka that permit-related work could not begin until October 15, 1995) to March 30, 1995 (the last date that Melka seeks recovery), the Court of Federal Claims found as a fact that Melka could not have been on standby because it knew then with certainty that it could not be called on to

perform the work before October 15. This finding is not clearly erroneous because "standby" requires an *uncertain* delay period where the government can require the contractor to resume full-scale work at any time. Here, Melka knew that it would not be called on to work on the contract until October 15. Nor was the government requiring Melka to keep at the Potomac River site its dredging and breakwater equipment. Rather, they were free to be moved and used elsewhere. Thus, *Eichleay* damages could not be awarded for this time period either.

B.

The penultimate time period, from January 4, 1995 (when Melka completed those contract tasks not dependent upon receipt of the permit) to February 2, 1995 (the date when the government and Melka agreed that the permit-related work would not commence until October 15, 1995), however, presents a different issue because the government concedes that Melka was on standby of indefinite duration during this period. The issue then becomes whether the government satisfied its burden of showing that it was not impractical for Melka to obtain replacement work

or that Melka's inability to obtain replacement work was due to circumstances not related to the government-caused delay. *See All-State*, 146 F.3d at 1376. The burden on the government, however, is one of production only--Melka still bears the ultimate burden of persuasion that it was impractical for it to obtain sufficient replacement work. *See Satellite Elec. Co. v. Dalton*, 105 F.3d 1418, 1421 (Fed. Cir. 1997) ("Despite the shift in the burden of production, the contractor must nevertheless 'establish . . . (3) that it was unable to take on other work.' *Altmayer v. Johnson*, 79 F.3d 1129, 1133 (Fed. Cir. 1996).").

In an effort to satisfy its burden, the government argues that Melka's work on the Steuart Petroleum and Leesylvania Park projects constitutes "replacement work." Those projects, according to the government, could not have been performed if Melka had been performing the dredging and breakwater parts of the government contract because, as Melka admits, it could only take on one such large dredging project at a time. The government also argues that Melka would have taken on more work had its bids been

successful and the economy been stronger, both reasons unrelated to the government's delay and suspension of work. Melka argues that the projects it took on were not "replacement work" because they were relatively small in comparison to the work on the government contract and were merely moved up in its schedule in order to mitigate its losses as a matter of good faith.

The Court of Federal Claims, which did not have the benefit of the *All-State* case when it made its decision, noted that Melka performed several other projects while on standby and bid, unsuccessfully, on several others. The Court of Federal Claims stated that the "key to *Eichleay* damages is the ability to do other work," and concluded that "[b]y obtaining and bidding on other work, it is reasonable to infer that it had the capacity to perform work it obtained." *Melka*, slip op. at 8. On this basis, the Court of Federal Claims held that Melka was not entitled to any *Eichleay* damages for this time period.

We hold the Court of Federal Claims applied the wrong legal test by improperly focusing on Melka's ability to take on *any* other work during the delay period as a basis for

holding that Melka was not entitled to any *Eichleay* damages. The test was incorrect because it failed to include a quantitative analysis. Although the incorrect test was applied by the Court of Federal Claims, its confusion was understandable given that *All-State* was not decided by this court until after the Court of Federal Claims rendered the decision here reviewed. *See Interstate*, 12 F.3d at 1055 (holding that the incorrect legal test for "standby" was applied, in part because of the unavailability of later, clarifying decisions of this court).

Also, at the time the Court of Federal Claims rendered its decision, this court's most recent application of the *Eichleay* formula was in *Satellite Electric*, portions of which could be read to indicate that if a contractor is able to perform *any* additional work during the delay that such circumstances will entirely defeat its claim for *Eichleay* damages. In *Satellite Electric*, we said:

> Finally, we reject Satellite's argument that the government had not rebutted Satellite's prima facie case because it had not shown that the additional work Satellite sought was intended to replace the suspended work. The work Satellite sought during the time

> of suspension, if Satellite had obtained it, necessarily would have replaced the suspended work.

105 F.3d at 1423 (emphasis added). While acknowledging that this reading of *Satellite Electric* was plausible "at first glance," this court in *All-State* concluded that "in context [the statement in *Satellite Electric*] appears to respond to the contractor's attempt to incorporate an 'intent' element into the government's rebuttal burden of proof," and therefore did not contradict the conclusion reached by the *All-State* court that "additional work is not automatically considered replacement work which would preclude recovery under the *Eichleay* formula." *All-State*, 146 F.3d at 1377 n.2; *see also* Fred D. Wilshusen, Hard Hat Case Notes, 18 Construction Lawyer 41, 41 (A.B.A. Oct. 1998) (noting that the "intention of the decision" in *Satellite Electric* was not to require "a viable contractor to cease its normal operation and quit bidding work to recover under the *Eichleay* formula" and that *All-State* properly rejected such an overly literal interpretation of language in *Satellite Electric*). One commentator has noted:

> Satellite had argued that the Government was required to demonstrate that the additional work Satellite sought was not part of Satellite's planned or normal stream of work but instead was intended to replace the government-delayed work. . . . Two commentators have remarked that if this statement is interpreted literally, *Satellite Electric* can be read to mean that if a contractor bids on, or is capable of obtaining, additional, but not substitute, work during the delay period, the contractor will not be entitled to *Eichleay* damages. Both from a legal and an accounting perspective, it seems unlikely that the court intended such a construction.

Scott M. McCaleb, in 1997 Year in Review: An Analysis of the Federal Circuit's Government Contracts Decisions, Pub. Cont. L.J. at 495, 530-31 (A.B.A. Spring 1998) (footnotes omitted). Thus, the appropriate inquiry, per *All-State*, is whether the government established through rebuttal evidence or argument that Melka was able to take on "replacement work," not just any additional work. The Court of Federal Claims, however, did not address this point, but instead appeared to view *any* additional work performed

or bid on by Melka as sufficient to bar its claim for *Eichleay* damages, totally. We are unable to discern from the record before us whether the work performed or bid on by Melka during this time frame was "replacement work," and even if so, produced sufficient support of overhead costs to absorb all the overhead costs that the government contract would have, if work had not been suspended. Therefore, the case is remanded to the Court of Federal Claims for a determination of this issue.

C.

On remand, the Court of Federal Claims should bear in mind the heavy burden that falls on the government once a contractor has established its *prima facie* case of entitlement to *Eichleay* damages. As this court has stated,

> We note that in very few cases where the contractor can demonstrate it was on standby during the suspension will the government be able to demonstrate that it was not impractical for the contractor to take on replacement work. This does not persuade us, however, that either the test or the burden should be altered. First, the government has the ability to control

> whether a contractor is on standby status during a suspension of work. By fixing, at the outset of the suspension period, a future date on which the contractor will be expected to return to work, or by allowing the contractor a "remobilization" period at the end of the suspension period, the government avoids keeping the contractor on standby during the suspension and thus avoids liability for unabsorbed overhead expenses in the future.

All-State, 146 F.3d at 1380 (citation omitted); *see also Mech-Con Corp. v. West*, 61 F.3d 883, 886 (Fed. Cir. 1995) ("[W]e have also recognized the impracticality of a contractor obtaining replacement work or reducing home office overhead when it must 'standby' during an 'uncertain' period of government-imposed delay."); *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1577-78 (Fed. Cir. 1994) ("When the period of delay is uncertain and the contractor is required by the government to remain ready to resume performance on short notice (referred to as 'standby'), the contractor is effectively prohibited from making reductions in home office staff or facilities or by taking on additional

work."); *Interstate*, 12 F.3d at 1057-58 ("When the period of delay or suspension is uncertain . . . and the contractor is required by the government to remain ready to resume performance on short notice ["standby"], the contractor is effectively prohibited from mitigating such overhead costs."); *C.B.C. Enters., Inc. v. United States*, 978 F.2d 669, 675 (Fed. Cir. 1992) ("As a result [of standby status], it is impractical for the contractor to take on other work during these delays."). Nevertheless, the government may be able to show that Melka was not injured by the delay. *See All-State*, 146 F.3d at 1380-81 ("[D]ifficult economic conditions that exist independent of the government's actions with respect to a delay in performance may prevent a contractor from obtaining replacement work, although this circumstance is in no way attributable to the government's delay."); *Satellite Elec.*, 105 F.3d at 1422 (contractor's inability to obtain other work was due in part to limitations in its security bond and a difficult competitive situation which were not due to the government delay). For example, the government argues that part of Melka's inability to obtain work was due to cold winter

weather, rather than the government-caused delay and requirement to stand by. Such evidence bears directly on the issue of what caused Melka's inability to obtain adequate replacement work, if in fact it was unable to obtain such work. Or, if bad weather prevented performance of work that was obtained, that circumstance hardly results from the government-caused delay.

It is also important to keep in mind what does *not* constitute replacement work. For example, the government cannot rebut Melka's *prima facie* case of entitlement to *Eichleay* damages "simply by showing that the contractor continued its normal operations, including continuing to bid on and perform 'additional' contracts." *All-State*, 146 F.3d at 1376; *see also Altmayer v. Johnson*, 79 F.3d 1129, 1135 (Fed. Cir. 1996) ("That [contractor] may have bid on other contracts 'at the very end' of the subject contract, does not establish that it was able to reduce its overhead or take on other work during the delay."). As this court stated in *All-State*,

> it would be inconsistent with the purpose behind *Eichleay* recovery to

> require a contractor to cease all normal, on-going operations during a government-caused suspension on one contract in order to guarantee its recovery of unabsorbed overhead costs. A healthy contractor may well be simultaneously engaged in multiple contracts, at different phases of performance. A government-imposed suspension during performance of one contract will not necessarily affect a contractor's ability to obtain and perform others.

All-State, 146 F.3d at 1376. Bidding on other projects can also support, rather than undercut, a contractor's argument that it was impractical for it to obtain replacement work, particularly if the projects that are bid upon could not be commenced and/or completed within the government-caused delay. In this case, for example, Melka argues that it could not obtain replacement work by bidding on other projects because such work involves substantial lead-up times that would render it impossible to begin the project, much less complete it, in a reasonable period of time, much less before the suspension is lifted. With respect to the contract at issue here, for example, three and a half months elapsed

from the time the project was advertised until work actually commenced. Such commercial realities in the relevant market may be highly material when determining whether it was impractical to obtain any replacement work, or sufficient replacement work.

Finally, the relative sizes of the projects at issue in terms of dollar amount, timing, and duration are relevant when determining whether a particular project is in fact "replacement work," as opposed to merely "additional work" in the ordinary course of business for a contractor that routinely performs multiple contracts, including simultaneously. The key is the potential for the new work to contribute a comparable amount to the contractor's overhead as the government contract would have absent the suspension, assuming that the time durations are also comparable. As we have noted in the past, however, "replacement work" need not be identical in size, duration, or type as compared to the delayed work. *See id.* at 1377. Indeed, in *All-State* we said:

> [A] replacement contract might be a contract different in size or duration

> from a contractor's ordinary type of work (for example, a $100,000 contract by a contractor who normally obtains multi-million dollar contracts), or a contract for a different type of work (for example, a repair contract rather than new construction). The critical factor, then, is not whether the contractor was able to obtain or to continue work on other or additional projects but rather its ability to obtain a replacement contract to absorb the indirect costs that would otherwise be unabsorbed solely as a result of a government suspension on one contract.

Id. Therefore, the government can effectively rebut a contractor's prima facie case and show that a claimant is not entitled to any Eichleay damages by showing that it was not impractical for the contractor to take on true replacement work and that work would contribute the same amount of money for the same time period toward overhead costs as the government contract would have, had the delay not occurred. On the other hand, if the same amount of money is not contributed to the overhead costs in the same period by the replacement work, then the contractor should be able to obtain at least some

Eichleay damages.

The relevance of the dollar amount, timing, and duration of the replacement work vis-a-vis the government contract may be best illustrated with examples. Although not realistic, these examples illustrate the principles clearly. Imagine, first, that a contractor has established its *prima facie* case and that the government-caused delay in question although indefinite at the start turned out to be thirty days, with an overhead rate on the contract of $1000 per day. Also assume that it was not impractical for the contractor to obtain at least some "replacement work." If the government shows that it was not impractical for the contractor to obtain three ten-day replacement contracts and perform them consecutively during the delay, and each contract contributed $1000 or more each day to overhead costs, then *all Eichleay* damages would be precluded because all of the overhead costs would be absorbed by the replacement work. Without unabsorbed, indeed unabsorbable, overhead, there is no basis for *Eichleay* damages. Next assume that the government shows that it was not impractical for the contractor to obtain one

replacement contract that lasted ten days and for each day it contributed $1000 to overhead. Then, the contractor is still entitled to *Eichleay* damages for the remaining twenty days of delay. In another example, assume that the government shows that it was not impractical for the contractor to obtain one thirty-day replacement contract that contributed $500 per day to overhead costs. Then *Eichleay* damages would not be precluded because roughly half of the overhead costs would remain unabsorbed.

Of course, the government need not show that the contractor actually obtained replacement work, but can merely show that it was not impractical to do so. But even so, the government cannot preclude the recovery of all *Eichleay* damages by showing that some additional work could have been obtained, or by showing that some replacement work was obtained although it failed to fully offset all of the overhead shortfall created by the government's delay. Such a standard indeed places a heavy burden on the government, but the burden is appropriate when "the government has the ability to control whether a contractor is on standby status during a

suspension of work." *All-State*, 146 F.3d at 1380. The government can avoid the difficulty of meeting the burden simply by not putting the contractor on standby. If, on the other hand, the government so values quick start-up and early completion once the suspension of work is lifted, then it will order indefinite standby, knowing of the possible liability. That is as it should be. Certainly, freedom of action should be left to the government and the contractor. The court is the least equipped to decide such things.

The discussion of examples above is meant to guide the trial court's analysis on remand, which is necessary because the record before us does not clearly indicate whether the work performed and bid on by Melka qualifies as "replacement work" under present case law of this court. Because the trial court applied an incorrect legal test and Melka has shown that it may have been unable to obtain sufficient replacement work during this time period, we vacate the decision of the Court of Federal Claims to the extent that it denied *Eichelay* damages during the time period of January 4 to February 2. And we remand for a re-determination of this

issue, possibly after receiving additional evidence, briefing, and/or argument from the parties, as the trial court sees fit.

III.

For the time periods between November 16, 1994 and January 4, 1995, and between February 2, 1995 and March 31, 1995, the Court of Federal Claims determined that Melka was unable to show that it was on standby and therefore held it was ineligible for *Eichleay* damages. We affirm those portions of its decision. With respect to the time period between January 4, 1995 and February 2, 1995, however, the Court of Federal Claims applied an incorrect legal standard to Melka's claims. We vacate that portion of its decision and remand for a re-determination under the correct test of whether Melka is entitled to *Eichleay* damages for that period, either fully or in part. Accordingly, the decision of the Court of Federal Claims is

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED.

COSTS

No costs.

United States Court of Federal Claims

96-536C

MELKA MARINE, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

June 10, 1998

[41 Fed.Cl. 122]

OPINION AND ORDER

HODGES, Judge.

Melka Marine moved for summary judgment on the issue of liability, claiming unabsorbed overhead and direct costs for idle equipment and loss of productive labor incurred as a result of the Government's issuance of a "Suspension of Work" order. Plaintiff asserts that defendant's failure to obtain a dredging permit

resulted in increased costs for which it was not compensated. Defendant cross-moved for summary judgment contending that plaintiff was fully compensated for any direct costs through contract modifications. Furthermore, plaintiff cannot establish the elements necessary to recover unabsorbed overhead under the Eichleay formula, according to defendant.

We denied the cross-motions for summary judgment because the circumstances surrounding the contract work performed by Melka Marine during the delay were unclear. Plaintiff proceeded to perform portions of the contract while other portions of the contract were delayed. Summary judgment is not proper where a material fact is in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

BACKGROUND

Plaintiff entered into a contract with the United States Navy on October 17, 1994. The contract included dredging work on the Potomac, construction of a breakwater, repair of an existing boat ramp and various other construction work at the Indian Head Marina in Maryland.

Performance on the contract was to begin within 15 days of contract award with all work to be completed in 90 days. According to the contract, no work could take place between March 1 and June 15 due to the rock fish spawning season. The breakwater and dredging portions of the contract were to be performed first. The Government was required to obtain a permit from the Corps of Engineers prior to the dredging and breakwater work.

Plaintiff mobilized its equipment November 1 through November 15, 1994. During mobilization, the Government informed plaintiff that it had not received a permit from the Corps. The Government issued a Suspension of Work order to plaintiff on November 29, halting performance of the contract for an indefinite period. The Contracting Officer sent a letter to plaintiff on December 1 stating that the dredging permit was not expected until mid-January or mid-February. The Government instructed plaintiff to demobilize any equipment set aside for use on dredging and breakwater work.

Plaintiff received a letter from the Government in February 1995 stating that

performance on the breakwater and dredging portions of the contract could not begin prior to October 15, 1995 because of permit delays and the rock fish spawning season. Plaintiff accepted the October 15 work resumption date and signed Contract Modification P00001 in March 1995. This extended the contract deadline to February 29, 1996 and increased the contract price by $42,688. Three other modifications were executed, only two of which are relevant here. Contract Modification P00002 in the amount of $7,163 was issued to compensate plaintiff for a changed condition in the quaywall, as well as for delay in work due to an uncovered pipe at the boat ramp excavation. Contract Modification P00003 for $19,837 was issued to reimburse plaintiff for overhead and field costs due to the Government stop work order of December 1, 1994. All work was completed in February 1996. Plaintiff seeks compensation for unabsorbed overhead and directs costs from November 16, 1994 through March 30, 1995.

DISCUSSION

The Eichleay formula is the appropriate test to determine whether unabsorbed overhead may

be recovered in government contracts. *Satellite Electric Co. v. Dalton*, 105 F.3d 1418, 1419 (Fed.Cir.1997). It is used to determine unabsorbed overhead "when the government delays work on the contract indefinitely but requires the contractor to remain available to resume work immediately on the government's instruction." *Id.* In general, "unabsorbed overhead consists of the time sensitive indirect costs incurred despite construction inactivity on a project, such as home office overhead including accounting and payroll services, general insurance, salaries of upper-level management, heat, electricity, taxes [and] depreciation." *Interstate General Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1058 (Fed.Cir.1993) (citing *Capital Electric Co. v. United States*, 729 F.2d 743, 746 (Fed.Cir.1984)). It is understood that overhead costs are those incurred "for the benefit of the whole business, which by their nature cannot be attributed or charged to any particular contract." *Altmayer v. Johnson*, 79 F.3d 1129, 1132 (Fed.Cir.1996).

To recover unabsorbed overhead under the Eichleay formula, a contractor must establish (1)

a government-imposed delay, (2) that the contractor was required to be on "standby" during the delay, and (3) while "standing by" the contractor was *unable* to take on additional work. *Satellite*, 105 F.3d at 1421 (emphasis added); *Mech-Con Corp v. West*, 61 F.3d 893, 886 (Fed.Cir.1995); *Altmayer*, 79 F.3d at 1133. Once it is shown that the contractor was required to standby and that the government-imposed delay was uncertain, the contractor has established a prima facie case of entitlement to unabsorbed overhead. The burden then shifts to the Government to show (not prove) that "the contractor did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay." *Mech-Con*, 61 F.3d at 886. The contractor must establish that it was unable to take on other work during the period of delay. *Satellite*, 105 F.3d at 1421.

The Federal Circuit reaffirmed the use of the Eichleay formula in *Satellite*, 105 F.3d at 1418. In *Satellite*, the Navy contracted with the plaintiff to install a power supply system. Twice during the contract period, the Government

suspended performance because of its inability to supply two items called for in the contract. The first period of suspension lasted 82 days; the second 146 days. During this suspension, plaintiff was required to "standby," but remain ready to resume work on the contract upon the Government's instruction.

Satellite bid on 49 contracts while standing by. It obtained only two. Thereafter, the plaintiff filed a claim with the Armed Services Board of Contract Appeals requesting Eichleay damages. The Board ruled that while Satellite had made out a prima facie case, the Government had successfully rebutted it by showing that the plaintiff could have reduced its overhead or taken on other work during the delay.

The court of appeals affirmed the Board's decision on appeal stating that plaintiff was not entitled to Eichleay damages because it could have taken on other work during the delay. The court noted that Satellite had bid on 49 jobs and was "aggressively" pursuing other contracts. This shows that it had the capacity to perform other work. "If the government shows that the contractor was able to handle other work—

whether or not it actually did so, which may have depended upon circumstances other than the delay--it refutes the underlying fact on which Eichleay damages are based." *Satellite*, 105 F.3d at 1423.

Plaintiff seeks unabsorbed overhead from November 16, 1994 to March 30, 1995. We will examine the claim in relation to four time periods.

A. November 16, 1994 to November 29, 1994

For a contractor to claim unabsorbed overhead under the Eichleay formula it must prove government-imposed delay. Id. at 1420. The Government issued a Suspension of Work order on November 29, 1995. This order suspended work on all portions of the contract for an indefinite period. No government-imposed delay occurred prior to November 29; the Suspension of Work order had not been issued. Therefore, no recovery is permitted during this time.

B. November 29, 1994 to January 4, 1995

Government-imposed delay began on November 29, 1994 when defendant suspended work on the contract after plaintiff requested that the Navy review designs of the boat ramp and

advise whether a previous ramp was in existence. The Government issued a revised stop work order on December 1 instructing plaintiff to begin work on repairs to the quaywall, the finger pier, and the boat ramp once all questions concerning its design were determined. All work relating to the dredging and breakwater work was to be demobilized.

Plaintiff was compensated for delay from November 29 to December 1 through Contract Modification P00003. The modification stated in part:

> You are hereby compensated for overhead and field costs due to the Government issued stop work order . . . dated 29 November 1994, further revised by stop work order . . . dated 1 December 1994. Boat ramp work was delayed until 15 December 1994.

The contract price was increased by $19,837 by this modification. Modification P00003 covered the stop work order costs through December 15. Plaintiff claims that this was a unilateral modification and that costs claimed for unabsorbed overhead are not covered by modification P00003. Plaintiff did not produce

evidence at trial to establish that these costs were not covered by the modification, however.

Plaintiff was not on standby from December 1 through January 4 so it does not meet the requirements for unabsorbed overhead under the Eichleay formula. The December 1 letter advised plaintiff that the dredging permit would not be available until January or February. Specifically, it stated, "[a]ll equipment on site that will not be utilized on the repairs to the boat ramp, quaywall, or the finger pier can be demobilized."

Plaintiff resequenced work under the contract and performed other work that did not require a dredging permit. The contract specifications "reserve[d] the right to change the order of work at any time." If plaintiff was working on the contract, it was not delayed or on standby. Plaintiff was uncertain when it could begin the breakwater and dredging portions of the contract, but that did not affect the resequenced work. Mr. Melka admitted during trial that Melka Marine was instructed to "demobilize [its] equipment ... [and] mitigate [its] damages."

The "standby" prong of the Eichleay formula does not focus on the idleness of the

contractor's work force, but on suspension of work on the contract. *Interstate*, 12 F.3d at 1057. Plaintiff claims that because its employees were not working on the contract every single day, it should be compensated for the days of idleness. If the test for standby were whether the work force assigned to the contract remained idle, the contractor would be less likely to mitigate its damages by laying employees off or reassigning them to other jobs during the standby period. *Id.* at 1057 n. 4. Plaintiff was working on the contract, so it was not on standby. Delay days prior to December 1 were covered through Contract Modification P00003. No recovery is available for unabsorbed overhead from November 29, 1994 to January 4, 1995.

C. January 4, 1995 to February 2, 1995

Plaintiff did not perform work on the Navy contract from January 4 to February 2, 1995. The Suspension of Work order delaying the breakwater and dredging portions of the contract was still in effect. The Government concedes that plaintiff was on standby during this period.

Once it is determined that a contractor was required to "standby," the question becomes

whether the contractor "was able to either reduce its overhead or take on other work during the delay." *Mech-Con*, 61 F.3d at 886. The Eichleay formula seeks to "compensate[ ] contractors who are unable to take on replacement work because the standby status prevents the contractor from doing so." *Satellite*, 105 F.3d at 1421. Damages for unabsorbed overhead are available only if the contractor's inability to take on other work is attributable to the Government. Id.

Plaintiff contends that it could not take on additional work beyond the work it actually performed. Its president testified that during the Suspension of Work order the Government had "their hooks into me . . . [and] you got to be ready to go when they call you." Plaintiff did take on other work during the standby period, however. It performed work for PEPCO, the Arlinton County Playground, Steuart Petroleum and Leesylvania Park. Plaintiff "bid . . . probably 15 jobs . . . [and] received contracts on about half of those jobs . . ." according to a consultant for Melka Marine. Mr. Melka confirmed that marine equipment could be used whenever he

found work for it.[1] Plaintiff could have obtained other work, and it did.

The key to Eichleay damages is the ability to do other work. Plaintiff incorrectly assumes that even it if could use its equipment on other jobs, if those other jobs did not reimburse it for every hour of the suspended contract then the Government is liable. This is not the Eichleay test. Whether plaintiff received the jobs it bid is irrelevant. By obtaining and bidding on other work, it is reasonable to infer that it had the capacity to perform work it obtained.

D. February 2, 1995 to March 30, 1995

Plaintiff was given a date certain when the breakwater and dredging portions of the contract could be completed on February 2. The Government informed plaintiff by letter that the breakwater and dredging work would not be

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1. Q: "Isn't it true that [you] used that [marine] equipment whenever you could?"
A: "Absolutely. If I could use it to mitigate my damages, I did, and I never charged [the Government] for that time."

performed until October 15, 1995. The letter stated in part:

> a. There are no impact and delay costs associated with delaying the remaining portion of the work.
> b. Performance of the dredging and breakwater extension portion of the contract must be at your *original bid price* and cannot begin prior to 15 October 1995.
> c. If you agree to the above mentioned conditions, a modification will be negotiated for time and *demobilization/remobilization costs only.*

Plaintiff agreed to these terms. Plaintiff was no longer on standby at this point. It had certainty.

Furthermore, the original contract stated that the dredging and breakwater work could not commence between March 1 and June 15 due to the rock fish spawning season. Plaintiff no longer was on standby then, so it cannot recover under the Eichleay formula for this period.

E. Direct Costs

Plaintiff maintains that it is entitled to an equitable adjustment for direct costs for idle equipment and labor during the period of

government-imposed delay. To be compensated for idle equipment, the contractor must show:

> that the equipment for which compensation is claimed was reasonably and necessarily set aside and awaiting use in performing the contract. Stated differently, we must be able to conclude that a contractor would prudently have held the equipment for which a claim is made in readiness to perform the Governmnet contract rather than making some other disposition of it, in order to find that the Government should pay the charges for that equipment.

J.D. Shotwell Company, ASBCA No. 8961, 65-2 BCA ¶ 5243 at p. 24,687, 1965 WL 591 (November 30, 1965). Moreover, the contractor must be deprived of productive use of the equipment "by being compelled by circumstances for which the Government is responsible to keep the equipment idle. It is not enough that the equipment simply was idle because the contractor had no other use for it at the time." *Lionsgate Corporation*, ENG BCA Nos. 5388, 5416, 5421, 5456, 91-2 BCA ¶ 24,008, 1991 WL 87879 (May 15, 1991).

We ruled in an earlier Opinion that plaintiff is not entitled to direct costs from March 1 through June 15, 1995. The contract prohibited work during this time due to the rock fish spawning season. Thus, the only relevant periods for purposes of direct cost analysis are November 16 through March 1, 1995.

Plaintiff was compensated for idle equipment costs through December 15, 1994. Modification P00003 reimbursed plaintiff $19,837 for overhead and field costs associated with the Government's stop work order. Plaintiff did not incur costs other than those reimbursed by Modification P00003.

Plaintiff's dredging equipment was demobilized from the Indian Head site and used on other construction projects during the delay period. For example, plaintiff mobilized its equipment to the Steuart Petroleum job in January 1995, and then to the Leesylvania Park job through March 1995. The equipment was used on other contracts. The Government did not require that plaintiff keep its equipment idle

during the delay.[2] We cannot say that plaintiff was deprived of economic benefit when it could move the equipment to other job sites. Plaintiff did not use the equipment every day, but it could have used the equipment had it found work.[3] The equipment did not have to remain idle.

Plaintiff knew that the dredging permit had not been received in November 1994. The contract required that the contractor "coordinate with the Contracting Officer" regarding the dredging permit.

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2. "All equipment on site that will not be utilized on the repairs to the boat ramp, quaywall, or the finger pier can be demobilized. Take any other steps necessary to minimized the incurrence of costs due to the suspension of permit related work." See Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Partial Summary Judgment, at Exhibit 6.

3. Q: "On the day where you charged a half day for [the marine equipment], had you wanted to use it the rest of that day you would have, wouldn't you have?"
A: "If I could have used it, yes, I absolutely would have used it..."

Modification P00001 extended the dredging and breakwater portions of the contract to October 15, 1995. Plaintiff was informed at a February 2 meeting that work could not begin until October. So plaintiff was not required to keep its equipment idle beginning in February. Moreover, no work could be performed during the rock fish spawning season. Plaintiff was not required to keep its equipment idle. It was told to demobilize it.

Plaintiff claims direct costs for loss of productive labor. The Government is generally liable for increased costs of idled labor during a government-imposed suspension of work. *See Signal Contracting, Inc.*, ASBCA No. 44963, 93-2 BCA ¶ 25,877, 1993 WL 70913 (March 3, 1993). During a work stoppage, a contractor must mitigate idle labor costs by transferring labor to other uses pending recommencement of the suspended work. *Id.* (citing *Hardeman-Monier-Hutcherson (JV)*, ASBCA No. 11785, 67-1 BCA ¶ 6210 at 28,748.)

Plaintiff contends that the Government delayed work under the contract, so it is entitled to incurred labor costs. Plaintiff's laborers were

performing work on the resequenced portions of the contract throughout December 1994. When plaintiff's employees were not working on the contract in January, they were performing other construction projects.

Plaintiff claims that it could not have released any employees because they were Melka Marine's "core crew." No evidence presented at trial showed that all idle labor claimed was necessary. Plaintiff could have layed off employees pending recommencement of the Navy project. Plaintiff kept personnel employed during days when no contract work was ongoing by requiring them to do "shop work." This work consisted of maintenance and repair of Melka Marine's equipment. While plaintiff claims this work is not significant, it derived a benefit from it.

Plaintiff's claim for direct costs for idle equipment and labor cannot be sustained. The record at trial does not establish that these are costs properly chargeable to the Government.

CONCLUSION

We denied the parties' motions for summary judgment on the issue of Eichleay and direct damages because they are factual

determinations according to the *Satellite* line of cases. In such circumstances, it was proper to hear testimony about plaintiff's willingness and ability to obtain contracts during the delay. Mr. Melka testified candidly that his effort was to "mitigate damages." This was an understandable and proper good faith effort that benefits the Government. He could have obtained other work during the suspension period, and he attempted to do so. In at least one instance, he was successful. There were small jobs, not of the magnitude offered by the Government. Nevertheless, the law seems clear that ability to take on other contracts is the dispositive factor.

We ruled from the bench that plaintiff had not shown an inability to obtain other contracts during the applicable period. We did not grant defendant's Rule 52 motion at that time because plaintiff asked that the record remain open for post-trial briefs and for other considerations. We have considered these maters, but now must enter judgment for the Government for the reasons stated by the court in this Opinion and on the record at trial. The Clerk will dismiss plaintiff's complaint. No costs.

United States Court of Federal Claims

96-536C

MELKA MARINE, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

August 4, 1997

[38 Fed. Cl. 545]

ORDER AND OPINION

HODGES, Judge

The case is before the court on cross-motions for summary judgment. Plaintiff is seeking unabsorbed overhead and direct costs for delays caused by the Government's Suspension of Work order.

I. Background

Plaintiff was awarded a contract by the United States Department of the Navy on October

17, 1994. The contract included dredging work on the Potomac, construction of a breakwater, repair of a boat ramp and other construction work at the Indian Head Marina in Maryland. Under the terms of the contract, performance was to begin within 15 days of the contract award and all work would be completed within 90 days. The contract specified that no work could take place during rock fish spawning season, March 1 through June 15. According to Melka Marine's government-approved contract schedule, the breakwater and dredging portions of the contract were to be performed first. All work was to be completed within 81 days.

The contract specified that the Government was responsible for obtaining a permit from the Corps of Engineers prior to commencement of the dredging and breakwater portions of the contract. Plaintiff mobilized its equipment on site November 1 through November 15. During mobilization, the Government informed Melka Marine that it had not received the permit. The Government issued a "Suspension of Work" order to Melka Marine on November 29, halting performance of the dredging and breakwater portions of the contract for an

indefinite period. The Government had not obtained the permit by the end of March, despite reassurances.

Melka Marine signed Contract Modification P00001 in March 1995, extending the contract deadline to February 29, 1996.[1] The contract price was increased by $42,688. Two additional contract modifications were signed by the parties. All work on the contract was completed in February 1996.

Melka Marine seeks compensation for unabsorbed overhead and direct costs from November 16, 1994 through March 30, 1995. We deny the cross-motions.

II. Decision

Plaintiff filed a motion for partial summary judgment on the issue of liability. Plaintiff argues that the Government is liable under the "Suspension of Work" clause incorporated into the contract for "any increase in the cost of performance of this contract (excluding profit)

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1. Originally, all work on the contract was scheduled to be completed by January 30, 1995. Under the modification, completion of the contract was delayed 419 days.

necessarily caused by . . . unreasonable suspension, delay . . ." FAR 52.212-12 (1994 ed.)

To recover under the "Suspension of Work" clause, a contractor must show that:

> (1) contract performance was delayed; (2) the government directly caused the delay; (3) the delay was for an unreasonable period of time; and (4) the delay injured the contractor in the form of additional expense or loss.

Commercial Contractors, Inc. v. United States, 29 Fed. Cl. 654, 661-662 (1993). Plaintiff argues that it meets these requirements, and that defendant is liable for direct costs. Plaintiff also argues that the Government is liable for unabsorbed overhead costs under the *Eichleay* formula. Defendant contends that plaintiff already has been compensated for increased direct costs and that the Government is not liable for overhead costs because plaintiff was able to take on other work during the delay.

Recovery of unabsorbed overhead costs is determined by the *Eichleay* formula. *Satellite Electric Co. v. Dalton*, 105 F.3d 1418, 1421

(Fed.Cir. 1997). To recover *Eichleay* damages, a plaintiff must establish that the Government caused the delay, the contractor was on standby during the delay and the contractor was unable to take on other work. *Altmayer v. Johnson*, 79 F.3d 1129, 1133 (Fed.Cir. 1996). Plaintiff bears the burden of proving the compensable delay, to stand by. *Satellite Electric*, 105 F.3d at 1421. Then, the burden shifts to the defendant. To rebut plaintiff's case for *Eichleay* damages, the Government need only show (and not prove) that the contractor could have taken on other work during the delay period. *Id.*

The Government argues that Melka Marine not only could have taken on other work, but also that it performed other work. Melka Marine did perform other contracts during the delay. *Eichleay* damages are improper when the contractor has obtained additional jobs while on delay because unabsorbed overhead from the suspended contract may be applied to the new contracts. If the contracts were obtained prior to the suspension and were rescheduled to be performed during the delay, *Eichleay* damages still may be appropriate. Contracts accepted

One contract performed by plaintiff during the delay was received prior to the suspension. The circumstances of other work performed during the delay are unclear. Whether this work was obtained prior to the suspension or after is an issue of fact. While several portions of the contract were suspended because a permit had not been obtained by the Government, plaintiff proceeded with other portions of the contract. Summary judgment is proper when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Bradbary v. United States, 30 Fed. Dl. 339, 340 (1994).

Work on the contract was prohibited from March 1 through June 15 because of the rock fish spawning season. Plaintiff is not entitled to overhead costs during this time. The same limitation on recovery applies to direct costs during this period.

Plaintiff's claim for direct costs is for idle labor and equipment. Delay damages for these direct costs involve questions of fact that are disputed. Defendant argues that the multiple contract modifications signed by the parties

compensated plaintiff for all increased direct costs. Plaintiff contends that it is seeking an adjustment for costs other than those described by the modifications. This is a factual issue that cannot be decided on summary judgment. Defendant's motion for summary judgment must be denied on the issue of direct costs.

III. Conclusion

Plaintiff's motion for partial summary judgment and defendant's cross-motion for summary judgment are denied for the reasons stated. The parties will contact the court no later than August 15, 1997 to propose a trial schedule.

United States Court of Appeals for the Federal Circuit

98-5149

MELKA MARINE, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THERETO, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing en banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on October 14, 1999.

FOR THE COURT

/s/

Jan Horbaly

Clerk

Dated: October 7, 1999